UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

NORDYNE INC., Plaintiff, v. FLICK DISTRIBUTING, LLC and THOMAS P. FLICK Defendants.	))))))))))	Civil Action No. 4:09-CV-00055TCM

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS OR TRANSFER

Nordyne Inc. ("Nordyne"), plaintiff herein, filed its Complaint against Flick Distributing Inc. ("Flick") and Thomas Flick ("Thomas Flick") (collectively "the Flicks") in this Court on January 9, 2009, nearly a month before the Flicks sued Nordyne in the United States District Court for the Eastern District of Louisiana (the "Louisiana Action") in connection with the exact same matter. Even though the action in this Court arises from contracts containing valid Missouri forum selection clauses and even though this action was filed first, the Flicks boldly seek to dismiss this case or to have it transferred to the federal court in New Orleans. For the reasons stated herein, this Court should deny the Flicks' Motion to Dismiss or to Transfer.

FACTUAL AND PROCEDURAL BACKGROUND

Since 2002, Flick has purchased Nordyne HVAC products and distributed them in Mississippi and in Louisiana. The parties entered into three separate distribution contracts, each for the distribution of a different brand of HVAC products: (i) the Nordyne Gibson Brand Distributor Agreement dated February 3, 2005 ("Gibson Agreement") (Exhibit 1 to Brandt Declaration); (ii) the Nordyne Residential Distributor Agreement for Westinghouse Brand dated May 14, 2002 ("Westinghouse Agreement") (Exhibit 2 to Brandt Declaration); and (iii) the

Nordyne Mammoth Product Distributor Agreement dated February 3, 2004 ("Mammoth Agreement") (Exhibit 3 to Brandt Declaration) (collectively the "Agreements."). Under paragraphs X-A-3 and X-B of the Agreements, Nordyne has the post-termination right, but not the duty, to re-purchase all or any portion of the Flick inventory.

Paragraph XVII of the Mammoth and Gibson Agreements explicitly provides that Missouri law governs disputes between the parties. The same provision also contains the following Missouri forum selection clause:

> "If any action is brought to enforce or interpret this Agreement, exclusive venue for such action shall be in the courts of the state of Missouri located in St. Louis County or the courts of the United States for the Eastern District of Missouri. The Parties hereby irrevocably waive any objection which either may now or hereafter have to the laying of venue in any actions or proceedings arising out of or in connection with this Agreement brought in the courts referred to in the preceding sentence and hereby further irrevocably waive and agree not to plead or claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum."

In anticipation of the May 14, 2002 Westinghouse Agreement, Flick also executed a Credit Agreement, dated April 16, 2002, (Exhibit 4 to Brandt Declaration) in which Flick again agreed that Missouri would be the governing law and the exclusive venue:

> "FOR PURPOSES OF ANY LAWSUIT OR CAUSE OF ACTION WHICH ARISES FROM OR RELATES TO THIS AGREEMENT OR THE DISTRIBUTION RELATIONSHIP BETWEEN THE PARTIES, DISTRIBUTOR HEREBY WAIVES THE RIGHT TO MAKE ANY CHALLENGE TO PERSONAL JURISDICTION AND OR VENUE IN ANY ACTION FILED BY NORDYNE INC. IN FEDERAL OR STATE COURT IN THE STATE OF MISSOURI AND DISTRIBUTOR AGREES TO SUBMIT TO

THE JURISDICTION AND VENUE OF SUCH COURT." (all caps in original)[1/]

On October 24, 2008, Thomas Flick called Joseph Brandt of Nordyne to advise him that Flick was terminating the Agreements in order to carry a competing line that required Flick to be its exclusive representative. At that time, Flick owed Nordyne almost $200,000 for HVAC product, parts and other promotional materials purchased on account. Thereafter, citing the Louisiana Repurchase of Farm, Industrialized Lawn and Garden Equipment by Wholesaler Act ("Louisiana Repurchase Act"), La. R. 51:481, *et seq*., Mr. Flick demanded that Nordyne repurchase Flick's Mammoth, Gibson and Westinghouse inventory. (Brandt Declaration ¶ 22). Nordyne rejected that demand. On December 10, 2008, Flick sent Nordyne a letter acknowledging that it owed Nordyne $195,202.70, but once more demanding that Nordyne repurchase Flick's inventory (Brandt Declaration ¶ 23). Nordyne rejected those demands for the reasons that it has no such contractual obligation and because the Louisiana Repurchase Act does not apply to the Nordyne HVAC inventory purchased by Flick.

Nordyne filed its five-count Complaint in this case on January 9, 2009. In Counts I through IV, Nordyne asserted various monetary claims against the Flicks for the recovery of the $195,202.70 owed. In Count V, Nordyne seeks a judgment declaring that it is not required to re-purchase the HVAC parts and inventory it sold to the Flicks.

On February 4, 2009, the Flicks filed their Complaint in the Louisiana Action against Nordyne, seeking relief under the Louisiana Repurchase Act. In that Complaint, the Flicks allege that (1) the Louisiana Repurchase Act applies to the parties' relationship and requires

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1/ Mr. Flick also executed a written Personal Guarantee, dated May 10, 2005 of Flick's debts and liabilities owed to Nordyne (Exhibit 5 to Brandt Declaration). Section 12 of the Personal Guarantee also states that Missouri law governs.

Nordyne to repurchase Flick's inventory, and (2) Thomas Flick's Personal Guarantee has been satisfied. *Id.* This action and the Louisiana Action involve the same parties, same legal and factual issues, same claims, same documents and same witnesses. Both cases center upon the same fundamental question: whether, following termination of the Agreements, the Flicks can invoke the Louisiana Repurchase Act to force Nordyne to repurchase the HVAC products in Flick's inventory, notwithstanding the contractual provisions stating that Nordyne has *no* such repurchase obligation and that Missouri law governs.

On March 3, 2009, Nordyne filed its Motion to Dismiss or Transfer the Louisiana Action based on the Missouri forum selection clause provisions and the first-to-file rule. (Schmidt Declaration ¶ 7). The following day, the Flicks filed their Motion to Dismiss this action or for its transfer to the federal court in Louisiana. The parties have agreed that, in the event this Court denies the Flicks' Motion to Dismiss or to Transfer, the Louisiana Action will be dismissed and the Flicks will raise their claims against Nordyne by way of counterclaims in this action. (Schmidt Declaration ¶ 9).

DISCUSSION

A. Motion To Dismiss

I. Venue is Proper In This Court Because A Substantial Part Of The Events Giving Rise To This Case Occurred Here.

The Flicks' claim that venue is improper in this Court is contrary to controlling law and ignores key facts. Venue is proper under 28 U.S.C. § 1391(a)(2) in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred…" The fact that another district may have a stronger connection to the claim does not render venue in the forum improper. The only inquiry is whether the forum has a substantial connection to the claim. In *Pecoraro v. Sky Ranch for Boys, Inc.*, 340 F.3d 558, 563 (8th Cir. 2003), a case cited by the Flicks, the Eighth Circuit concluded that venue in Nebraska was proper, even though "South Dakota's connection to the defendants [was] much stronger." ("In making our determination, we do not ask which district among two or more potential forums is the 'best' venue, rather, we ask whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts."); *Setco Enterprises v. Robbins*, 19 F.3d 1278, 1280-81 (8th Cir. 1994) (same).

Based on *Pecoraro* and *Setco Enterprises*, this Court's determination of the Flicks' motion to dismiss on venue grounds must center on an analysis of the Missouri connections—without consideration of any alleged connections to Louisiana and without comparing the relative strength of the connections to each state. The Flicks' attempt to characterize venue analysis under § 1391(a)(2) as an "either-or" proposition is wrong as a matter of law.

The facts—most of which the Flicks ignore—demonstrate that virtually all of the events giving rise to this case occurred in this district. The Agreements were made in Missouri because they were executed here by Nordyne after the Flicks had signed them in Louisiana. (Brandt Declaration ¶ 9). A contract is made where the last act necessary to form a binding agreement occurs. *Products Plus, Inc. v. Clean Green, Inc.*, 112 S.W.3d 120 (Mo. App. 2003); *State ex rel. Career Aviation Sales, Inc. v. Cohen*, 952 S.W.2d 324, 326 (Mo. App. 1997).

In addition, Thomas Flick frequently came to Missouri to meet with Nordyne to discuss the parties' business relationships. Mr. Flick traveled to Missouri as recently as September 2008 for a Nordyne distributor meeting. Nordyne performed its contractual obligations in Missouri by manufacturing the HVAC products and shipping them from Missouri. Flick took ownership of HVAC products in Missouri because the products were shipped F.O.B. Missouri. Flick repeatedly directed purchase orders and payments to Nordyne in Missouri. Nordyne sent its invoices for Flick's purchases from Missouri. (Brandt Declaration ¶¶ 10-15).

On these facts, Missouri clearly has a substantial connection to the events that form the basis for this case. *May Dept. Stores Co. v. Wilansky*, 900 F. Supp. 1154, 1162-63 (E.D. Mo. 1995) (substantial nexus between Missouri and cause of action for purposes of venue under 1391(a)(2) where addendum to employment contract was prepared and executed in Missouri, defendant made numerous visits to Missouri in connection with his employment, contractual obligations were performed in part in Missouri, and consequences of defendant's breaches were felt in Missouri, even though "significant events" occurred outside Missouri as well); *Decision Point Technologies, Inc. v. Johnson*, 2006 WL 3779799 (E.D. Mo.) (where both jurisdictions have a substantial connection to the claims asserted, motion to dismiss for improper venue should be denied). The mere presence of Flick inventory in Louisiana does not deprive this Court of proper venue. Because a substantial part of the events that gave rise to the claims occurred in this district, venue is proper in this Court and the Flicks' Motion must thus be denied.

II. Even If A Substantial Part Of The Events Giving Rise To This Case Had Not Occurred In This District, Venue Is Proper In This Court Because Missouri Is The Parties' Contractually-Selected Forum.

If, but only if, this Court were to conclude that a "substantial part of the events giving rise to the claim" did not occur in Missouri, this Court would need to consider whether venue is proper here because of the Missouri forum selection clauses in the various Agreements.

Federal law determines the validity and enforceability of forum selection clauses, even in diversity cases. *Sun World Lines, Inc. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986). In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1971), the Supreme Court overturned the body of law holding such provisions unenforceable as contrary to public policy. Forum selection clauses are now upheld under traditional freedom of contract principles, and the resisting party must make "a strong showing of unfairness" in order to invalidate them. *Sun World Lines*, 801 F.2d at 1067. Although certain "compelling circumstances" (fraud, violation of public policy, or showing that enforcement would effectively deprive the resisting party of his day in court)[2/] may undo a forum selection clause, the Flicks have failed to identify, much less prove, any such circumstance.

While the forum selection clauses in the Agreements speak of "any action . . . brought to enforce or interpret this Agreement," plaintiffs cannot avoid those provisions by contending that this litigation seeks enforcement of a statute rather than a contract. Because § 487 of the Louisiana Repurchase Act expressly states "[t]he provisions of R.S. 51:484 through 486 shall supplement any contract, as defined in R.S. 51:481," (see copy of Louisiana Repurchase Act attached) that statute—if applicable—is incorporated into the very Agreements that contain the forum selection clauses.[3/]

It is true that the Missouri forum selection clause was somehow left out of the Westinghouse Agreement. In fact, however, many of the parts covered by the three Agreements are inter-changeable (Brandt Declaration ¶ 16). Even if the Westinghouse products could be separated from the other products for purposes of litigation, the result would be duplicative cases

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2/ *See Servewell Plumbing LLC v. Federal Ins. Co.*, 439 F.3d 786, 789-91 (8th Cir. 2001).

3/ In addition, the forum selection clauses in the Agreements provide that "[t]he parties hereby irrevocably waive any objection which either may now or hereafter have to the laying of venue of any actions or proceeding *arising out of* or in connection with this Agreement brought in the [Missouri] courts . . ." (emphasis added). In *Terra International, Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688, 694-95 (8th Cir. 1997), the Eighth Circuit held that a forum selection clause covered non-contract (tort) as well as contract claims because the defective technology that resulted in the plant explosion involved the same operative facts as a parallel claim for breach of contract would have done.

in Missouri and Louisiana, a waste of judicial resources, and the possibility of inconsistent results.

Further, the Flicks ignore the April 16, 2002 Credit Agreement that was executed in anticipation of the May 14, 2002 Westinghouse Credit Agreement. The forum selection clause in the Credit Agreement, by its terms, applies to any lawsuit "which arises from or relates to …the distribution relationship between the parties…" (Exhibit 4 to Brandt Declaration). Any dispute over re-purchase of the Westinghouse branded products undeniably arises out of the parties' distribution relationship, and the Flicks "waive[d] the right to make any challenge to personal jurisdiction and or venue in any action filed by Nordyne in federal or state court in the state of Missouri…" *Id.*

The Eighth Circuit has rejected efforts to segregate related contracts for forum selection clause purposes. In *Dakota Gasification Co. v. Natural Gas Pipeline Co. of America*, 964 F.2d 732, 736 (8th Cir. 1992), the Court applied the forum selection clause in a Pipeline Affiliates Agreement to a Gas Purchase Agreement because the Gas Purchase Agreement was conditioned upon signing the Pipeline Affiliates Agreement. Likewise here, Flick executed the Credit Agreement containing a Missouri forum selection clause as a condition to purchasing HVAC products under the Westinghouse Agreement.

In *Rainforest Café, Inc. v. EklecCo., LLC*, 340 F.2d 544, 545 (8th Cir. 2003), where the party resisting the forum selection clause affirmatively pleaded the contract containing that provision, the Eighth Circuit enforced that clause. Precisely the same thing occurred here: The Flicks raise *all three Agreements*—Mammoth, Gibson, and Westinghouse—in their Louisiana Complaint (Schmidt Declaration ¶ 10). While the Flicks now claim that most of the products at issue fall under the Westinghouse Agreement, they made no such distinction in their Louisiana

Complaint. This change in tactics is revealing: The Flicks are now trying to fabricate a distinction between the products so as to evade the binding forum selection provisions in their Agreements and Credit Agreement.

In any event, because the Missouri action was brought first, it has priority, under the well-established "first-to-file" rule, to resolve the controversy as to *all the products* at issue between the parties, even if some are not strictly covered by the Missouri forum selection clause. The well-established rule is that, in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case. *Midwest Motor Express, Inc. v. Central State, Southeast and Southwest Areas Pension* Fund, 70 F.3d 1014 (8th Cir. 1995); *United States Fire Insurance Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487 (8th Cir. 1990); [4/] *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002 (8th Cir. 1993). The very purpose of the first-to-file rule is to overcome the piecemeal litigation that would inevitably follow if the alleged obligation to re-purchase the Westinghouse products alone was separately adjudicated in Louisiana.[5/]

4/ The Flicks cite *Goodyear Tire* for the proposition that they are the "true plaintiffs" in this action because Nordyne's Complaint includes a claim for declaratory judgment. In fact, *Goodyear Tire* supports Nordyne. The Eighth Circuit there affirmed the district court's application of the first-to-file rule when it allowed the insurers' first-filed declaratory judgment action to proceed in the face of a second-filed action for money damages elsewhere.

5/ Contrary to the statements of the Flicks' counsel at the Scheduling Conference, Nordyne was not engaged in forum shopping when it filed this case. Nordyne had no reason to believe that the Flicks would sue in Louisiana or, for that matter, anywhere other than Missouri because any such filing would be in clear violation of the contractual forum selection clause! Nordyne had every reason to believe that, if the Flicks did sue, they would abide by their Agreements and Credit Agreement and sue in Missouri. Nordyne brought this declaratory judgment action in the very forum the parties agreed would be the exclusive venue.

B. Motion To Transfer

III. Transfer Of This Action To The Eastern District Of Louisiana Would Be Unwarranted And An Abuse Of Discretion.

Federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under 28 U.S.C. § 1404(a) bears the burden of proving that a transfer is warranted. *Terra International v. Mississippi Chemical Corp.*, 19 F.3d 688, 695 (8th Cir. 1997). Unless the balance of convenience weighs strongly toward the movant, the transfer motion should be denied. *May Dept. Stores*, 900 F. Supp. at 1166.

In view of the up-hill battle imposed upon the party seeking transfer, judges in this district have regularly denied such motions. *Johnson v. Oak Leaf Outdoors, Inc.*, 2008 U.S. Dist. LEXIS 4515 (J. Mummert); *Garr v. Garr*, 2006 WL 1134535 (J. Mummert); *Popular Leasing USA, Inc. v. Austin Automotive Warehouse Corp.*, 2005 WL 1798088 (J. Mummert).

See Hall v. The Holmes Group, Inc., 2006 WL 148742 (J. Autrey); *Anheuser-Busch, Inc. v. All Sports Arena Amusement, Inc.*, 244 F. Supp. 2d 1015 (E.D. Mo. 2002) (J. Buckles); *CCA Global Partners, Inc. v. Yates Carpet, Inc.*, 2006 WL 1045919 (J. Hamilton); *Data Manufacturing, Inc. v. Newbold Corp.*, 2006 LEXIS 18123 (J. Hamilton); *Insituform Technologies, Inc. v. Corbitt*, 2005 WL 2738374 (J. Hamilton); *Zurich American Ins. Co. v. Dawes Rigging & Crane Rental*, 2006 WL 744417 (J. Jackson); *Vutek, Inc. v. Leggett & Platt, Inc.*, 2008 WL 2483148 (J. Perry); *Monsanto Co. v. LaValle*, 2008 WL 1767050 (J. Perry); *Johnson v. Precision Airmotive, LLC*, 2008 WL 1349212 (J. Perry); *Maritz, Inc. v. C/Base, Inc.*, 2007 WL 433378 (J. Shaw); *Enterprise Rent-A-Car Company v. U–Haul Int'l, Inc.*, 327 F. Supp. 2d 1032 (E.D. Mo. 2004) (J. Shaw); *United States Fidelity And Guaranty Co. v. American Guarantee And Liability Ins. Co.*, 2007 WL 1289723 (J. Sippel); *Meridian Enterprises Corp. v. Bank of America Corp.*, 2007 WL 2363518 (J. Sippel); *Macon Electric Coil, Inc. v. Ampheral*

Corp., 2006 U.S. Dist. LEXIS 36681 (J. Sippel); *Anheuser-Busch, Inc. v. City Merchandise*, 176 F. Supp. 951 (E.D. Mo. 2002) (J. Sippel).

On top of the heavy burden any transfer movant must satisfy, the Missouri forum selection clause presents an insuperable obstacle to Flicks' motion. As this Court pointed out in *Popular Leasing*, a party seeking transfer in the face of an agreed-to forum selection clause must show that "proceeding in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." 2005 WL 1798088, *6 (*quoting Dominium Austin Partners v. Emerson*, 248 F.3d 720, 727 (8th Cir. 2001)). Mere inconvenience to that party will not defeat an otherwise valid forum selection clause. *Servewell Plumbing LLC v. Federal Ins. Co.*, 439 F.3d 786, 790 (8th Cir. 2006) (inconvenience of litigating an Arkansas-based controversy in Florida insufficient to negate forum selection clause). The Flicks cannot and do not suggest that litigation in this forum rather than in Louisiana would effectively deprive them of their day in court.[6/]

Even if the Missouri forum selection clause were invalid or could be ignored, the Flicks fall woefully short of their burden. In *Terra Int'l*, the Eighth Circuit observed that "[t]he statutory language [of § 1404(a)] reveals three general categories of factors that courts must consider when deciding a motion to transfer: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice." 119 F.3d at 691. We address those factors in that order.

6/ The only Eighth Circuit case we can find that invalidated a forum selection clause because it effectively deprived a party of its day-in-court is *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 345-46 (8th Cir. 1985), which involved an Iran forum selection clause after the 1979 revolution there and during its war with Iraq.

(1) The Convenience Of The Parties

Both parties have witnesses who reside in their respective jurisdictions. Likewise, Nordyne's documents are in Missouri, and the Flicks' are in Louisiana. (Schmidt Declaration at ¶¶ 11-12). Because these materials will be photocopied and produced during discovery, their physical location is irrelevant. The presence of the HVAC products in Mississippi and Louisiana is also irrelevant because this case is based upon contract and statutory interpretation, not upon any alleged defect or condition of the product.

It would be no more inconvenient for the Flicks to litigate here than it would be for Nordyne to litigate in Louisiana—a state in which Nordyne has no property, offices or employees (Brandt Declaration ¶ 17). As in *Popular Leasing*, "[t]his factor does not favor either side. It would be more convenient fro the Plaintiff to try this case in the Eastern District of Missouri and more convenient for Defendant to try it in the Eastern District of [Louisiana]." 2005 WL 1798088, *11. It is well-settled that "[m]erely shifting the inconvenience from one side to another . . . obviously is not a permissible justification for a change of venue." *Terra Int'l*, 119 F.3d at 696-97.

(2) The Convenience Of The Witnesses

While this factor is said to be the primary, if not the most important factor in passing on a motion to transfer, *May Dept. Stores*, 900 F. Supp. at 1165, the Flicks have done nothing to satisfy it. The Flicks have identified only two of their employees as witnesses and no non-party witnesses, but Nordyne has already identified six witnesses of its own—all of whom reside in this district. (Schmidt Declaration at ¶ 12). One of the Flicks' two witnesses, Thomas Flick, has often come to St. Louis for business purposes and thus could easily come here to testify as well. While the Flicks' other witness, John Zemlik, must allegedly take care of his ill spouse, there are ways to deal with that (if, indeed, that circumstance remains at trial), the most obvious of which is a video-taped deposition. *See Hall*, 2006 WL 148742, **11-12; *Terra Int'l*, 922 F. Supp. 1334, 1360 (N.D. Iowa 1996) *aff'd* 119 F.3d 688 (8th Cir.) ("[N]or is there any convincing showing that the testimony of any necessary witness cannot be adequately presented by deposition, either read into the record from a transcript, or in the form of a videotaped deposition played for a jury").[7/]

In any event, the Flicks have failed to establish this factor because they have not stated, even in general terms, the nature of the testimony their two witnesses would provide. *Insituform Technologies*, 2005 WL 2738374, **16-17; *Enterprise Rent-A-Car*, 327 F. Supp. 2d at 1046 ("it is the burden of the party seeking transfer to specify clearly the key witnesses to be called and indicate what their testimony will entail"); *American Standard v. The Bendix Corp.*, 487 F. Supp. 254, 264 (W.D. Mo. 1980) ("if the party moving for transfer merely makes an allegation that witnesses will be necessary, without identifying these necessary witnesses and indicating what their testimony at trial will be, the motion for transfer based on convenience of witnesses will be denied").

(3) The Interest Of Justice

Factors considered in connection with the "interest of justice" include (1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of

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7/ It also strains credulity to suggest that Mr. Zemlik could not find care for his spouse for the one day it would take for him to travel to St. Louis and give his testimony.

local law. *See Terra Int'l*, 119 F.3d at 696. Only some of these factors have application here.[8/] The most important factor is plaintiff's choice of forum because courts give it "considerable deference." *Terra Int'l*, 119 F.3d at 695. Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *City Merchandise*, 176 F. Supp. at 959 ("great weight" to plaintiffs' choice of venue). The Flicks have identified no basis to set aside Nordyne's choice of forum.

Another factor is judicial economy. Because the parties have agreed that the issues will be litigated in only one jurisdiction (depending upon how this Court rules this motion) and will not litigate in two courts under any set of circumstances, considerations of judicial economy do not require transfer of this action. *Enterprise Rent-A-Car*, 326 F. Supp. 2d at 1046.

Other relevant factors are the conflict of law and local law issues. As detailed above, the parties various agreements were all made in this district, and (save one) provide that Missouri law governs. Even if there were no enforceable choice-of-law clause, however, Missouri law would apply because the principal performance of the contracts occurred here, including manufacture, shipment, delivery and billing. *See e.g., Dillard v. Shaughnessy, Fickel & Scott Architects, Inc.*, 943 S.W.2d 711 (Mo. App. 1997). Finally, this Court is better positioned to construe Missouri law than a Louisiana Court would be.[9/]

8/ Comparative costs of litigating in each forum, the ability to enforce a judgment, and obstacles to a fair trial are all non-issues in this case.

9/ The Flicks maintain that transfer is appropriate under *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942). But the *Brillhart* line of cases is inapplicable because it deals with a federal court's decision to stay a declaratory judgment action during the pendency of parallel *state court proceedings*. Here, because there are two similar actions pending in federal courts of equal power and concurrent jurisdiction, the appropriate doctrine is the first-to-file rule, which mandates that the issues be litigated in this district rather than the Eastern District of Louisiana.

In the final analysis, this motion merely seeks transfer to a venue more convenient to the Flicks but less convenient for Nordyne. "This is not a sufficient showing of inconvenience to overcome the defendant's burden under 28 U.S.C. § 1404(a)." *All Sports Arenas Amusement, Inc.*, 244 F. Supp. 2d at 1022. The Flicks have completely failed to sustain their heavy burden of proof.

CONCLUSION

For all the foregoing reasons, the Flicks' Motion to Dismiss or to Transfer should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of March, 2009, the foregoing was served upon the following counsel of record via the court's electronic filing system:

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